United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-4240

To be argued by
THOMAS J. LILLY

United States Court of Appeals

For the Second Circuit

Docket No. 75-4240

NEW YORK PRINTING PRESSMEN AND OFFSET WORKERS UNION, NO. 51, INTERNATIONAL PRINTING AND GRAPHIC COMMUNICATIONS UNION, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF ON BEHALF OF PETITIONER

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Statement of Issues

Was the National Labor Relations Board justified by substantial record evidence in refusing to find an unfair labor practice where:

A. The employer refused to disclose its financial records to the union requesting them, after the employer negotiator responded to a union wage demand by stating that "he couldn't reach the union numbers" and by referring to the employer's need "to keep things in proper balance."?

B. The employer unilaterally granted a wage increase while the union was on strike and after the employer refused to disclose its financial records to the union?

C. The employer unilaterally shifted its bargaining position by rescinding its earlier agreement granting a union security clause to the union?

STATEMENT OF THE CASE

Preliminary Statement

Petitioner seeks review of a decision and order of the National Labor Relations Board dismissing a complaint which alleged that the employer had violated sections 8 (a)(1), (3) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. 158(a)(1), (3) and (5). *Milbin Printing Inc.*, 218 NLRB No. 29 (1975.)

Members Ralph E. Kennedy and John A. Pennello joined in the Board decision. Member Howard Jenkins, Jr. dissented. Petitioner specifically contends that the dismissal of the complaint as it pertained to Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), proscribing a refusal to bargain by an employer, is not supported by substantial evidence on the record.

Statement of the Facts

A complaint (A. 1a-9a)[1] filed by the General Counsel of the National Labor Relations Board ("Board") alleged that Milbin Printing, Inc., Morlain Press, Inc., Pressure Sensitive Tape and Labor Corp., MCM Advertising, Inc., Courtney Press, Inc. ("Employer") violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended ("Act"), 29 U.S.C. 158(a)(1), (3) and (5). The Board, by members Kennedy and Penello, not per-

[1] "A" references are to the Appendix to the briefs.

suaded that the employer violated the Act, dismissed the complaint. Members Jenkins, dissenting, would have found that the employer refused to bargain with New York Printing Pressmen and Offset Workers Union No. 51 ("Union") in violation of Section 8(a)(5) of the Act by refusing to submit records to verify a claim of financial inability to meet the union's demands, unilaterally granting a wage increase, and bargaining without intention of reaching an agreement.

The union was certified by the Board as collective bargaining agent on October 10, 1972 (A. 6a, 12a). Commencing on October 26, 1972 the union and employer met in 21 negotiating sessions (A. 51a-52a).

At a bargaining meeting on January 16, 1973, the parties had an unproductive discussion about wages. Later other subjects, including union security, were fully discussed and a tentative written agreement (A. 206a, 205a) was signed by the parties, providing for, inter alia, union security, i.e., a contractual requirement that employees join the union following a stipulated 30 day grace period (A. 65a-67a; 162a-163a, 178a-179a). The employer testified that he fully understood the meaning of the union security clause when he agreed to its inclusion (A. 179a-180a).

On January 18, the employer negotiator dispatched a letter (A. 210a) to the union attempting to rescind its commitment on the subject of union security:

> "You're a great pair of bargainers, but you've gotten me in an awful mess with my brothers and I have to make some changes in what we discussed earlier.
>
> "We had a meeting yesterday to review everything that took place at our bargaining session on

Tuesday. They feel I did more than they had authorized me to do and to quote one of them, I had 'given away the company' by agreeing in principle to so many recommendations. We had a bad time, but I was finally able to convince them to go along with everything with one exception.

"The one exception is that the company cannot and does not agree at this time to give you a guaranteed union membership for all the employees until we agree on the monetary issues. As one of my brothers put it, and I now have to agree, having thought out the matter further, that it is probably one of the most important issues to the union and it should not be given until we first have an agreement from you regarding our economic situation that is satisfactory to us. Therefore, Section 3 of the contract, which requires everyone to be in the union, is an open issue until we reach agreement on the economics.

"I am sorry to have to do this, but I must if I am to be able to live with my brothers and be able to negotiate with you. Since we have made such headway on all of the other parts of the agreement, which includes areas concerning the holiday and the death leave, I am sure we can make progress on the remaining matters as long as you will agree to be reasonable about the economics.

"I look forward to your coming up with some new proposals that are more in line with our company's situation. Please excuse me for this, but you can blame it on your own persuasiveness—I opened my mouth before I realized what I was doing.

"Thank you in advance for being fair and considerate."

Although the written agreement, as corroborated by the letter attempting rescission, indicates an unconditional commitment to union security on January 16, the Administrative Law Judge ("ALJ") relied on a later affidavit by the union negotiator (A. 113a) to negate the clear meaning of the letter agreement granting a union security provision to the union. The ALJ determined that the grant of union security was conditional on final agreement on financial matters (A. 32a-33a).

According to the testimony of a union official, at a meeting on January 25, 1973, Daniel Cooper, as negotiator for the employer, told the union that "he couldn't reach our [the union] numbers," referring to the union's contract proposals (A. 68a).

The union negotiator testified that he told the employer that "if he couldn't reach our numbers and the company couldn't do it, if we could see the books at that time we would then tailor a contract to fit his financial, what his financial ability to pay was." The employer refused to produce the requested financial records, on the grounds that it was "nobody's business." (A. 68a-69a).

Cooper never expressly said that the employer "could not afford" to pay more in wages and fringe benefits, (A. 152a-153a) but rather, in addition to repeatedly pleading that "he couldn't reach" the union numbers, a "favorite expression" of the employer, (A. 75a-77a) he referred to the need "to keep things in proper balance" with regard to employer costs (A. 110a, 149a). On several occasions he told the union that "he couldn't meet" their demands and "couldn't balance it out." (A. 200a).

Additional meetings were held in February and March by the union and company representatives (A. 51a). At a meeting on March 27, 1973, (A. 79a) the company nego-

tiator responded to a modified union wage demand by stating "your numbers are too steep for us, we can't reach your numbers . . ." and again the company refused to disclose its books to union inspection (A. 82a). Again at negotiating sessions on April 3 and May 15, the company refused to disclose its books and claimed that it "couldn't reach" the union's numbers, that it "couldn't give any more" (A. 83a-85a; 90a-91a). On May 16, the union, confronted with this stalemated bargaining, began a strike, (A. 94a) which was motivated to some degree by the employer assertion that he "couldn't reach" the union "numbers." (A. 126a, 140a). Still later, when it appeared that agreement had been reached on financial matters on June 19, the employer refused to include union security in any settlement on the grounds that only 6 employees engaged in the union strike, while 18 employees continued working (A. 96a-100a).

Meetings of the employer and the union continued during the work stoppage, during which the employer continued to refuse to honor the union's demand for a disclosure of its books (A. 101a, 108a). At their final session on October 10, the employer made its final offer for settlement (A. 106a-108a). Thereafter the employer, on October 12, unilaterally granted a wage increase to all its employees, (A. 117a) and on November 8 advised the union that it would no longer meet, unless the union demonstrated its support by a majority of the employees (A. 220a).

ARGUMENT

A. Duty to Disclose

The National Labor Relations Act, as amended, specifically Section 8(a)(5), 29 U.S.C. 158(a) (5) makes it an unfair labor practice for an employer to refuse to collec-

tively bargain with a representative of its employees. The failure of an employer to disclose its financial records to a union of its employees was seemed a variation of this unfair labor practice in *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149 (1956), wherein an employer refused a demand by the union for information to substantiate the employer's claimed inability to pay the union's collective bargaining demand. The Supreme Court adopted the NLRB doctrine in this matter with the often quoted passage:

> "Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy. And it would certainly not be far-fetched for a trier of fact to reach the conclusion that bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim."

In approving the Board finding of an unfair labor practice in these circumstances, the Supreme Court was adopting a principle of good faith collective bargaining earlier enunciated for this circuit in *NLRB* v. *Jacobs Mfg. Co.*, 196 F. 2d 680, 2d Cir. (1952), *i.e.*, this Court determined that good faith collective bargaining required that an employer claiming financial inability must produce "whatever relevant information it has to indicate whether it can or cannot afford to comply with the union's demands."

In thus promoting collective bargaining disclosure, this Court relied on its rationale in a still earlier decision, *Yawman & Erbe Mfg. Co.*, 187 F. 2d 947, 2d Cir. (1951).

There the employer denied a union request for certain wage data. This Court's response to that refusal is helpful with regard to the present case.

> "The rule governing disclosure of data of this kind is not unlike that prevailing in discovery procedures under modern codes. There the information must be disclosed unless it plainly appears irrelevant. Any less lenient rule in labor disputes would greatly hamper the bargaining process, for it is virtually impossible to tell in advance whether the requested data will be relevant except in those infrequent instances in which the inquiry is patently outside the bargaining issue."

It is now clear, beyond argument, that good faith collective bargaining requires that an employer furnish, upon request of the union, all relevant data and information it may have, in order to facilitate intelligent bargaining and agreement. It would seem, therefore, that the only open question is whether this employer obligation to substantiate its financial condition is triggered when the employer negotiator repeatedly takes the position that "it can't meet the union numbers" in answering a union wage demand. Or, put in terms referrable to Section 10(f) of the Act, 29 U.S.C. 160(f), for appellate review purposes, is there "substantial evidence on the record considered as a whole" to justify a finding by the Board that, employer protestations regarding its inability to "met the union numbers" did not raise the issue of employer financial inability, and consequently did not impose an obligation to substantiate its financial status.

Certainly, the obligation to disclose is not limited to circumstances where the employer uses the precise formulation of words which occurred in *Truitt Mfg. Co., supra*. Rather,

any bargaining position by an employer, regardless of the magical or non-magical word formulation, which puts in issue the financial condition of the employer, imposes simultaneously, an obligation to disclose its books and records in support of that bargaining position.

The Board has recognized that responses other than a flat assertion of "inability to pay" can impose the obligation to disclose substantiating data. For instance, the Board found that an employer refusal to furnish financial data in support of its bargaining position seeking a lower wage schedule violated Section 8(a)(5) of the Act, where the employer justified its position that the wage reduction was necessary in order to remain competitive and to assure "the profit to which they were entitled." *Palomar Corporation*, 192 NLRB 592 (1971), enforced as *NLRB* v. *Palomar Corporation*, 465 F. 2d 731, 5th Cir. (1972). Likewise a declaration by an employer negotiator that "the employees came to the wrong well . . . The well is dry." required the production of financial records. *NLRB v. Unoco Apparel, Inc.*, 508 F. 2d 1368, 5th Cir. (1975). See also *Stanley Building Specialties Co.*, 166 NLRB 984 (1967), enforced as *United Steelworkers of America, AFL-CIO, Local 5571* v. *NLRB*, 401 F. 2d 434, D.C. Cir. (1968), equating a claimed need to remain competitive with a claim of inability to pay; *NLRB* v. *Western Wirebound Box Co.*, 356 F. 2d 88, 9th Cir. (1966), in spite of the employer assertions that the company was not pleading inability to pay, it was required to disclose the company books where the employer expressed concern about maintaining its competitive position; and *Stockton District Kidney Bean Growers, Inc.*, 165 NLRB 223 (1967), there an employer declaration of "no mood to pay" required substantiation by disclosure of financial data.

The observation of this Court in *NLRB* v. *General Electric Company,* 418 F. 2d 736, 750, 2d Cir. (1969), appropriately summarizes all these decisions:

> "The rationale of these opinions seems obvious; if the purpose of collective bargaining is to promote the 'rational exchange of facts and arguments' that will measurably increase the chance for amicable agreement, then sham discussions in which unsubstantiated reasons are substituted for genuine arguments should be anathema."

In the present situation, the union negotiator was repeatedly confronted with employer representations that "he couldn't reach the union numbers", the union numbers were "too steep", and employer protestations that he had "to keep things in proper balance". It is noteworthy, that the employer position was not an outright refusal to pay the union wage demands, i.e., the employed did not contend that it *wouldn't* reach the union numbers, but rather that it "couldn't" reach the union numbers. Thus, the distinction made in *United Fireproof Warehouse Co.* v. *NLRB,* 356 F. 2d 494, 7th Cir. (1966), is not pertinent. The Court ruled there that "stubborn resolution" not to meet a union demand did not require the production of employer records. Here, the employer indicated internal financial conditions precluded meeting the union demands.

In the light of the disclosure doctrine urged by the Supreme Court, this Court, and the Board, it would seem that such a naked bargaining position should be substantiated, where, as here, the union reasonably requested financial records in order to "tailor a contract to fit . . . [the employer] ability to pay." Without a disclosure of the supporting financial records, the bargaining is reduced to sham conclusory statements, which will not produce the agreements Congress intended to be produced.

Even assuming that only a flat assertion of "inability to pay" imposes the obligation to disclose, the statement, "he couldn't reach [the union's] numbers" because "he had to keep things in proper balance" is the functional equivalent of claiming "inability to pay". There is no substantive difference in the effect of these two statements. The inability to keep "proper balance," if there were increased wages, is merely the explanation of why the Respondent could not afford to increase wages. As the dissenting Board member stated, ". . . Respondent's contention that it was not pleading inability to pay but only that it could not afford more than it was offering and still keep things in proper balance appears to be self-contradictory, for if an increase above that offered would have that effect, it would seem to follow that Respondent was financially unable to provide it."

The union, understandably, contends that the employer put its ability to pay in issue by its aforementioned conclusory statements. This, in turn, obligated the employer to disclose its records. If this employer is excused from disclosure in these circumstances, it should be congratulated on its fortuitous exercise in semantic brinkmanship. The *Truitt* mandate would thus be reduced to a word game to be played by adventurous employers suggesting financial inability based on: competitive considerations, desired profit margins, cost factors, etc., but avoiding an unequivocal declaration of "inability to pay". The search by employer negotiators would then be for magical words to convey to union negotiators an impression of financial distress without being trapped in the consequences of *Truitt*. It is a tactic that was tried and failed in *NLRB* v. *Southland Cork Co.*, 342 F. 2d 702, 4th Cir. (1965). There the employer claimed its refusal to accede to union demands was based on its "sound business judgment," rather than

on inability to pay. The Court did not appreciate the distinction and imposed the *Truitt* obligation. Finding a distinction between a bargaining position of "inability to pay" and the various protestations of this employer can only be characterized as arbitrary and capricious. The Board, in acknowledging such a distinction in this case, hardly encourages the rational exchange of facts and arguments the system is supposed to promote.

B. Unilateral Wage Increase

The Board did not take cognizance of the employer unilateral grant of a wage increase on October 12 as a refusal to bargain, on the grounds that such unilateral action was permissible in view of an existing bargaining impasse. In the absence of a genuine impasse, a unilateral change in benefits by an employer is *per se* a violation of the duty to bargain. *NLRB* v. *Katz,* 369 U.S. 736, 745 (1962). However, where a bargaining party has created the impasse through its violation of the Act (here by the employer refusal to disclose), then the unilateral change in working conditions is not excusable and constitutes an unfair labor practice itself, a violation of Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5). *Industrial Union of Marine and Shipbuilding Wkrs.* v. *NLRB,* 320 F. 2d 615, 621, 3d Cir. (1963). Here the failure to engage in good faith bargaining, by refusing to disclose financial records, precipitated the impasse. Since the employer created the impasse, he can not, thereby, justify the unilateral wage increase. Rather, this action constitutes a separate refusal to bargain, another stone in the unfair labor practice mosaic constructed by the employer. This unilateral wage increase bestowed by the employer in the context of a strike is particularly suspect as this Court has observed in *NLRB*

v. *Fitzgerald Mills Corp.*, 313 F. 2d 260, 2d Cir. (1963), cert. den. 375 U.S. 834 (1963).

> " . . . a wage increase given after a strike has been called and been unsuccessful, has been held to be evidence probative of prior bad faith in negotiations. [Citing a case] The announcement of the increase contemporaneously with the strike decision could well be found a deliberate attempt by the company to deal individually with the employees, and convince them that all benefits would come from the company's sole choice, thereby weakening the union in its strike effort. This timing is particularly convincing support for the conclusion that prior negotiations were not conducted in good faith."

The Board, in determining that the instant wage increase was permissible, did so on the premise that the *Truitt* doctrine was not violated, and accordingly, did not consider the impasse as unlawfully created by the employer. The Board similarly gave no consideration to the strike context in which the wage increase was unilaterally granted. Had the Board given proper consideration to these factors, it necessarily would then have found the unilateral wage increase as a violation of Section 8(a) (5) of the Act, 29 U.S.C. 158(a) (5).

C. The Union Security Shift

It is well established that unilateral shifts in bargaining, following a representation of agreement, is evidence of bad faith bargaining. *American Seating Co.* v. *NLRB*, 424 F. 2d 106, 5th Cir. (1970); *Marley Co. 150 NLRB* 919 (1965). The union contends that the employer represented that agreement had been reached on union security on January 16, that this agreement was incorporated in a tempo-

rary written agreement by the parties, and by letter on January 18, the employer attempted to rescind this agreement. The finding by the Board, through the ALJ, that there was no such agreement is incomprehensible and simply is not supported by substantial evidence. There is no satisfactory rationale by the Board or the ALJ explaining their rejection of the written agreement or the rescision letter as evidence of a commitment on the subject of union security.

The total rejection of a union security agreement by the employer, at the June 19 negotiating session, was patently an attempt to raise an issue that would prevent the consummation of an agreement. This shift in bargaining position was not justified by a reliance on the fact that 18 employees failed to join in the strike. This merely evidenced that a majority of employees were not committed to strike activity, but did not evidence a lack of support for union membership or union security. The observation by the ALJ that the union knew the non-striking employees opposed union security is unfounded, totally lacking any record support.

The plain reading of the record is that the employer committed itself to a union security clause on January 16, attempted to escape this commitment by its letter of January 18, and unjustifiably rejected union security on June 19 in order to avoid an agreement which was otherwise imminent. All of this shifting and evading was consistent with an overall pattern of bad faith, and any contrary determination defies the substantial evidence of the record.

Conclusion

Petitioner requests an order of this Court setting aside the decision and order of the Board in so far as it dismissed the complaint and in so far as it failed to find that the employer violated the Act by refusing to disclose its financial records and by unilaterally granting a wage increase to its employees and rescinding its agreement on union security. Petitioner further requests that this cause by remanded to the Board for further proceedings consistent with a determination that the employer did violate the Act in the described manner.

Dated: New York, New York
February 9, 1976

Respectfully submitted,

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—o—

STATE OF NEW YORK }
CITY OF NEW YORK } ss.:
COUNTY OF NEW YORK }

KENNETH A. POGANIK, being duly sworn, deposes and says, that he is over 18 years of age. That on the 9th day of February, 1976, he served 3 copies of the attached Brief on the attorney for the Respondent herein by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a U. S. Post Office at 90 Church Street, New York City, directed to said attorney ~~at~~ as follows

General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue
Washington D.C. 20570

that being the place where he maintains ~~an~~ offices for the regular transaction of business, and the last address mentioned in the papers last served by him

Kenneth A. Poganik
....

Sworn to before me this

9th day of February, 1976.

Monroe D. Rosen

MONROE D. ROSEN
Notary Public, State of New York
No. 24-4616000
Qualified in Kings County
Commission Expires March 30, 1977